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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

STATE OF FLORIDA, AND A. S. WELLS, E. S. MATTHEWS AND MAMIE G. EATON, as and constituting FLORIDA RAILROAD COMMISSION, *Appellants,*
versus
UNITED STATES OF AMERICA INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*
No. 16.

BROOKS-SCANLON CORPORATION, WILSON CYPRESS COMPANY, CUMMER CYPRESS COMPANY, *Appellants,*
versus
UNITED STATES OF AMERICA INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*
No. 17.

Appeals from the District Court of the United States from the Northern District of Georgia, Atlanta Division.

REPLY OF THE APPELLANTS TO THE "MEMORANDUM ON DISCRIMINATION" FILED BY THE APPELLEE, ATLANTIC COAST LINE RAILROAD COMPANY, AT THE ARGUMENT OF THIS CAUSE.

FRED H. DAVIS,
Attorney General of the State of Florida,
Of Counsel for Appellants in No. 16.
HENRY P. ADAIR,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The Court allowed the appellants five days within which to file a reply to the "Memorandum on Dis-

crimination'' filed by the appellee, Atlantic Coast Line Railroad Company.

I.

Many of the cases and much of the discussion in the appellee's Memorandum relate solely to discrimination against persons and localities.

The fact is that the gravamen of the whole proceeding before the Interstate Commerce Commission in the case at bar related to discriminations against persons and localities. Such also was the gravamen of the Commission's report itself. Such also was the gravamen of the District Court's first decision and opinion in this cause. That this is true is clear from the first opinion of the District Court (R. 44) which, by construction, limited the scope of the intrastate order (as originally formulated) to border points of origin in North Florida.*

But it must also be borne in mind that the District Court *upon the rehearing,* when it came to consider discriminations against persons and localities, *i. e.,* against "particular interstate commerce in logs,'' found that the record in the case permitted no such statewide order as the Commission made. Thus, the District Court, *in its second opinion,* held (what it held in its first opinion) that (R. 167):

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*As to the position of the Georgia Public Service Commission of record in the proceeding before the Interstate Commerce Commission, respecting the issues there, see Brief of the State of Florida, pages 4, 5, 23; Brief of Brooks-Scanlon Corporation, pages 8, 9, 26, 27; Brief of Wilson Lumber Company, page 26.

The scope of the issue was not broadened by (a) any intervention, by (b) any order of the Interstate Commerce Commission (under Section 15-1 or otherwise), or by (c) acquiescence, nor did the appellants at any time recognize the jurisdiction or power of the Interstate Commerce Commission to affect the intrastate rate under its power respecting *revenue* discriminations. Brief of the State of Florida, pp. 24, 29, 30; Brief of Brooks-Scanlon, et al., 58 to 61, incl.

> "The evidence does not show any actual or potential interstate commerce from South Florida" (meaning by South Florida the three-fourths or more of the carrier's lines which lie South of Gainesville), "in such logs as are involved in this rate. Because of their cheapness and of the geography of the State the inherent probabilities are against it. No such case is, therefore, shown by the evidence as to justify a statewide order altering the intrastate rate because of undue prejudice to shippers and localities, or because of undue discrimination against *the particular interstate commerce in such logs.*" (Italics ours.)

In so holding the District Court followed the plain terms of the *Illinois Passenger Fares case,* 245 U. S. 493, the *Wisconsin Passenger Fares Case,* 257 U. S. 563, and its companion case, the *New York case,* 257 U. S. 591.

The Court below having found on rehearing that the record would not support the statewide order based upon discriminations against persons, localities, and *the particular interstate commerce in logs,* proceeded then to examine further to determine whether upon any other theory the statewide order might be sustained. The District Court then said (R. 168):

> "There is, however, another discrimination against general interstate commerce when one state rate or the system of state rates is so low as to throw an undue burden on the revenues arising from interstate commerce in order to sustain the carrier engaged in both kinds of commerce."

The impropriety and unlawfulness of the order sustained upon the so-called revenue discrimination

has been fully discussed in our briefs upon the aspects of the territorial scope of the investigation, the scope of the proceeding, the want of a general level of log rates established by the Interstate Commerce Commission, the insufficiency of the evidence, and other substantive and procedural matters, and so needs no further discussion here. And numerous authorities have been cited by us to sufficiently illustrate to the Court the principles of law upon which we rely. We shall therefore refer to no other authorities save a few which are mentioned in the Memorandum of the Appellee.

II.

THE DAYTON-GOOSE CREEK CASE, 263 U. S. 456 (Page 7 of Appellee's Memorandum).

In the *Dayton-Goose Creek case,* the Court sustained the constitutionality of the recapture clause and construed Section 15-A of the Interstate Commerce Act as amended. In discussing Paragraph 17 of Section 15-A (which declares that no shipper shall be entitled to recover excessive or discriminatory rates upon the sole ground that any particular rate may reflect a portion of the excess income to be paid by the carrier to the Commission under the provisions of Section 15-A), this Court said (Text 481):

> "This last clause only prevents the shipper from objecting to a particular rate otherwise reasonable, on the ground that the net return from the whole body of rates is in excess of a fair percentage of profit,—a circumstance that was never relevant in such an inquiry, as hereafter shown."

Among other things it was asserted in the *Dayton-Goose Creek case* that the surplus earnings of the carrier, if not the property of the carrier, were the property of the shipper. On this aspect the Court said in part (text 484):

> "It is then objected that the government has no right to retain one half of the excess, since, if it does not belong to the carrier, it belongs to the shippers, and should be returned to them. If it were valid, it is an objection which the carrier cannot be heard to make. It would be soon enough to consider such a claim when made by the shipper. But it is not valid. The rates are reasonable from the standpoint of the shipper, as we have shown, though their net product furnishes more than a fair return for the carrier. The excess caused by the discrepancy between the standard of reasonableness for the shipper and that for the carrier, due to the necessity of maintaining uniform rates to be charged the shippers, may properly be appropriated by the government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier. Yet it is made up of payments for services to the public in transportation, and so it is properly to be devoted to creating a fund for helping the weaker roads more effectively to discharge their public duties."

As we take it, the necessary holding of the *Dayton-Goose Creek case* was that the surplus revenues, if any, of the carrier, were as such no concern of the shipper.

The proceedings before the Interstate Commerce Commission were adversary proceedings and were instituted against the carrier by the Georgia Public

Service Commission for the benefit of Georgia log shippers, and the report of the Interstate Commerce Commission recited this to be the fact (R. 18; R. 791). Therefore, the standing of the Georgia Commission in those proceedings and in the subsequent court proceedings is that of a Georgia shipper.

If a shipper has no right to or concern with the surplus earnings of a carrier, as such, upon the ground that the rate paid by him is contributing to that excess, then surely a Georgia shipper has no right or interest to make or maintain a revenue statewide attack upon the intrastate rate of another state upon the theory that the state rate imposes a revenue burden upon the carrier. For indeed, the shipper has no direct interest at all in the net revenues as such.

Thus, from the standpoint of the shipper there is no discrimination. This is forcibly brought to mind when we consider that the revenue section of the Act, to-wit, Section 15-A, was held by this Court in the *Wisconsin Passenger Fares case,* 257 U. S. 653, to confer no powers on the Commission, but to impose a duty upon it. And by interpretation the Court has so construed Section 13 as amended as to provide the machinery by which the duty imposed by Section 15-A may be performed by the Interstate Commerce Commission.*

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*Substantive and procedural action similar to that sustained in the *Wisconsin case* was taken by the Interstate Commerce Commission in *State of Alabama v. United States Interstate Com. Comm.*, 42 F. (2d) 469, in investigating, adjudging and removing a revenue discrimination arising out of Alabama intrastate fertilizer rates.

III.

THE WISCONSIN PASSENGER FARES CASE, 257 U. S. 653.

The *Wisconsin case* is cited by our adversaries' Memorandum to support their theory of unified control which is in effect the theme of its Memorandum.

In the brief of the State, at pages 35 to 39 inclusive, a careful analysis of the *Wisconsin case* and of the case at bar are placed between two parallel columns, and how wholly different is the *Wisconsin case* and its companion case, the *New York case,* from the case at bar, is shown by that parallel comparison.

The *Wisconsin case* carefully negatives this notion of unified control where this Court in referring to the conclusion reached in that case, says (text 590):

> "It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with the intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."

This Bill of Rights for the states has been included in most of the important cases involving the Transportation Act of 1920, since the decision in the *Wisconsin case,* including the latest decision of this Court upon that subject, to-wit, the *North Dakota case,* decided at the end of last term.

IV.

The appellee in its Memorandum attempted to demonstrate that if all the timber in the Hinds, Otter Creek, Momosassa, Withlacooche River, Perry and Carbur sections of Florida were to be shipped at the newly prescribed intrastate rate, instead of the former Florida intrastate rate, the gross revenue gain to the carrier would be approximately $6,000,000.00. This is a calculation based upon the estimated standing timber, the probable eventual total cut, the estimated weight per foot, and the resulting total pounds, which it is assumed would be transported at the rates prescribed by the Interstate Commerce Commission. It is a calculation compelled by the absence from the record of precise figures showing the relation of log revenues carried on the Cummer Scale of rates to the system or the Florida intrastate revenues of the Atlantic Coast Line,—all of which precise figures are peculiarly within the knowledge and possession of that carrier. This estimate does not indicate whether it contemplates that such shipments and such revenue gains will be spread over five years, ten years, twenty years, or more or less.

Furthermore, this estimate entirely ignores the testimony of the owners of the timber in those sections, many of whom testified (as the record shows) that if any substantial increase in the then existing intrastate rate was prescribed they would be compelled to abandon their existing mills and villages at tidewater and construct their mills in the timber itself. The report of the Commission (R. 24, 797) makes reference to the testimony produced on this subject by one of the largest of these lumber companies. This testimony of the mill owners was not contradicted in

any particular and if true, the gross revenue result would be very different from that prophesied by the appellee's Memorandum. Indeed, the State's bill (R. 14) shows that two of such lumber companies (not parties here) owning a large part of the very timber referred to in the appellee's Memorandum, due to the fixation of the new intrastate rate, have abandoned their tidewater investments and operations and the larger of them has built its mill in the timber,—thus obviating any necessity of log transportation at the rates prescribed by the Interstate Commerce Commission.

In the face of that testimony and those allegations, no one has the right to assume that the movement of many of the mills from tidewater to the timber will not be and has not been accomplished and thus the gross revenue reduced instead of increased. Rather, as we think the Court will recognize, this is a case where, in the language of Mr. Chief Justice Taft in the *Wisconsin case* (Text 591), "it may well turn out that the effect of a general order in increasing all rates * * * will * * * reduce income instead of increasing it by discouraging patronage."

V.

Again we submit that the order of the Interstate Commerce Commission entered in this proceeding prescribing a Florida intrastate rate for application within and throughout the entire State of Florida

without exception is unlawful, and should have been enjoined by the Court below.

Respectfully submitted,

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